

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 12, 2006 Session

**McMURRAY DRIVE AREA HOMEOWNERS ASSOCIATION, ET AL. v.
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND
DAVIDSON COUNTY, ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 04-2680-IV Richard Dinkins, Chancellor**

No. M2005-00616-COA-R3-CV - Filed April 18, 2006

Area residents' association filed a petition for a writ of certiorari, seeking judicial review of the Planning Commission of the Metropolitan Government of Nashville, Davidson County, Tennessee's revision to an existing residential Planned Unit Development. Respondents filed a motion for summary judgment based on the expiration of the statute of limitations. The trial court granted the motion and Petitioners appeal. The judgment of the trial court is reversed and the case is remanded for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

George A. Dean, Nashville, Tennessee, for the appellant, McMurray Drive Homeowners Association.

J. Brooks Fox and John L. Kennedy, Nashville, Tennessee, for the appellee, The Metropolitan Government of Nashville and Davidson County, Tennessee.

Douglas A. Brace, Nashville, Tennessee, for the appellee, Gertrude Tibbs Ezell.

Thomas V. White, Nashville, Tennessee, for the appellee, Centex Homes.

OPINION

On April 1, 2004, Centex Homes requested a revision of its existing residential Planned Unit Development ("PUD") from the Planning Commission of the Metropolitan Government of Nashville, Davidson County, Tennessee ("the Planning Commission"). On July 8, 2004, the

Planning Commission held a public hearing where the Board granted Centex Homes' request and approved the development of 218 town homes and access to those homes from McMurray Drive. The members of the McMurray Drive Area Residents' Association were present at the July 8, 2004, hearing and voiced their objections to the proposed revision at that time.

Trish Brooks ("Ms. Brooks"), Administrative Assistant to the Planning Commission, also attended the July 8, 2004, meeting and recorded every motion, vote and outcome. However, she did not record the discussions or public comments. Ms. Brooks' notes were subsequently typed and distributed to the members of the Planning Commission at the Board's next meeting on July 22, 2004. At that meeting, the Board approved, without change, the official minutes from the July 8, 2004, meeting.

On September 17, 2004, the McMurray Drive Area Residents' Association and Frank Bannon filed a petition for a writ of certiorari, seeking judicial review of the revision made by the Planning Commission. Centex Homes filed a motion for summary judgment on December 2, 2004, claiming that Petitioners were barred from asserting their claim under Tennessee Code Annotated section 27-9-102. The trial court granted Centex Homes' motion on January 31, 2005.

The McMurray Drive Area Residents' Association and Mr. Brannon filed a timely notice of appeal. Appellants' sole issue raised on appeal concerns whether the trial court erred in granting Centex Homes' motion for summary judgment based on the expiration of the statute of limitations.

The appellate court reviews the trial court's award of summary judgment *de novo* with no presumption of correctness below. *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn.2001). Summary judgment is appropriate where there is no genuine issue of material fact relevant to the claim or defense and where the movant is entitled to judgment as a matter of law on the undisputed facts. *Tenn.R.Civ.P. 56.03*; *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn.1997). The moving party bears the burden of demonstrating that no genuine issue of material fact exists. *Pate v. Service Merchandise Co., Inc.*, 959 S.W.2d 569, 572-73 (Tenn.Ct.App.1996). The trial court must view the evidence in the light most favorable to the nonmoving party, and must draw all reasonable inferences in the nonmoving party's favor. *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn.1993).

Pursuant to Tennessee Code Annotated section 27-9-102, any person seeking judicial review of a decision made by a board or commission has "sixty (60) days from the entry of the order or judgment" within which to petition for certiorari. Failure to file for a writ of certiorari within this time period will preclude the court's review of a commission's decision. *Johnson v. Metro. Gov't for Nashville Davidson County, Tenn.*, 54 S.W.3d 772, 774 (Tenn.Ct.App.2001). The question raised before this Court concerns the date on which approval of Centex Homes' revision request was entered as an order or judgment.

Centex Homes argued and the trial court agreed, that the notes taken by Ms. Brooks at the Planning Commission meeting on July 8, 2004, constituted the "entry of the order or judgment," and thus, the McMurray Drive Area Residents' Association had sixty days from July 8, 2004, to petition

for certiorari. Because Appellants did not file for a writ of certiorari until September 17, 2004, the trial court found that Appellants were time-barred from judicial review of the Planning Commission's decision and granted Centex Homes' motion for summary judgment.

Appellants contend however, that the Planning Commission's decision to grant Centex Homes' revision was not entered as an order or judgment until July 22, 2004, when the Board approved, without change, the official minutes from the July 8, 2004, meeting. Using July 22, 2004, as the date of the "entry of the order or judgment," Appellants assert that they would not be barred under Tennessee Code Annotated section 27-9-102.

In determining when the Planning Commission's decision was entered as a order or judgment, the trial court appeared to rely heavily on the affidavit of Rick Bernhardt, Executive Director and Secretary of the Planning Commission. The affidavit of Mr. Bernhardt provided:

1. I serve as the Executive Director and Secretary of the Planning Commission of The Metropolitan Government of Nashville, Davidson County, Tennessee. I have been employed in this position for approximately five (5) years.
2. On May 13, 2004, the Planning Commission of the Metropolitan Government of Nashville, Davidson County, Tennessee, considered the Applicant's request for a rezoning and change to a Planned Unit Development (PUD) on a 21.87 acre tract of land located along the north side of McMurray Drive approximately one-quarter of a mile east of this rezoning request. Representatives for the applicant neighbors that lived in the immediate area of the property and Metro Councilmember from this area, Randy Foster, attended this meeting. At the conclusion of the public hearing by the Planning Commission, the Planning Commission unanimously moved to defer this matter. This matter was considered again by the Planning Commission at its meeting on July 8, 2004.
3. On July 8, 2004, the Planning Commission again considered a request by the applicant for a change to the original Planned Unit Development for this piece of property. The original Planned Unit Development allowed for the development of 270 residential units (originally apartments) with direct access onto the property from McMurray Lane and McMurray Court (two smaller substandard points of access that feed directly onto McMurray Drive), and indirect access onto the property from McMurray Drive. McMurray Lane and McMurray Court basically serve as driveways to McMurray Drive, which is a far larger street and deemed a collector street under Metro standards. The Planning Commission allowed a change to the original PUD on July 8, 2004, and allowed this change as a revision to the original PUD.
4. The actions of the Metro Planning Commission, on July 8, 2004, were officially recorded by Trish Brooks, an Administrative Assistant at the Metro Planning Commission. Ms. Brooks regularly attends the Planning Commission meetings and records the events of the Planning Commission meetings, including every motion made and the outcome of each vote. The recordings, as taken down by

Trish Brooks are used as the official basis of the Planning Commission meetings. The actions taken on July 8, 2004, were done in a manner consistent with the rules and procedures of the Metro Planning Commission. The procedures which she followed on July 8, 2004, included the official recording on that date of the motion, actual vote and outcome as a basis for the minutes of the Metro Planning Commission. The recordings by Trish Brooks at the Planning Commission meetings after the actual vote is taken, constitute the entry of the Planning Commission for that action.

5. The minutes of the Planning Commission of July 8, 2004, are subsequently typed up and distributed to the members of the Planning Commission and are generally approved in summary form at the next Planning Commission meeting. The minutes from the prior Board meeting are generally not dealt with on a separate basis, but are generally approved as a collective item for all matters that were considered at the prior Planning Commission meeting.

The debate between the Planning Commission members on July 8, 2004, took place immediately following the presentation by a number of the neighbors in the area of the property, as well as representatives for the applicant. The debate by the Planning Commission members was in public before this same group, and the decision was made in the presence of those same persons.

On July 22, 2004, the minutes from the July 8 Planning Commission hearing, including those for the changes to the PUD which is the subject of this litigation, were approved. There were no changes made to the transcript and recordation of the vote as taken by Ms. Brooks on July 8, 2004.

6. Neither the recordation by Ms. Brooks on July 8, 2004, nor the approval of these minutes on July 22, 2004, are sent to either the applicant or any of the parties who appear at the Planning Commission hearings.

Based on Mr. Bernhardt's affidavit, the trial court went on to make the following findings of fact in its January 25, 2005, order:

1. Counsel for the Petitioners and counsel for the Respondents stated to the Court that there was no issue of material fact for trial and the Court concurs that there is no genuine issue of material fact for trial.
2. The Court finds that the date of entry of the order or judgment as set out in Tennessee Code Annotated, §27-9-102 was July 8, 2004. This was the date for which public notice was given in order to inform affected persons of the Respondent's request. This was the date that Petitioners and Respondents appeared before the Metropolitan Planning Commission and presented their respective positions on the request of the Respondent, Centex Homes. After a presentation by representatives for the Petitioners and representatives for the Respondents, the public hearing was closed and the members of the Planning Commission debated the relief as requested by the Respondent Centex Homes. In the presence of representatives of the Petitioners and

representatives of the Respondents, the Planning Commission announced their decision, which was a nine to one vote in favor of the relief as requested by the Respondent Centex Homes.

3. Trish Brooks, an administrative assistant at the Metropolitan Planning Commission, attended the meeting of July 8, 2004, and in the course of her regular duties recorded the motion, vote, and outcome for the official minutes of the Metropolitan Planning Commission. As set out in the Affidavit for Rick Bernhardt, the Executive Director and Secretary of the Planning Commission of The Metropolitan Government, the recordings by Trish Brooks at the Planning Commission meeting of July 8, 2004, after the actual vote was taken, constituted the entry of the Planning Commission for that action. The only action of the Planning Commission after the activities of July 8, 2004, was the approval of the minutes of the July 8, 2004 meeting, which took place on July 22, 2004, when the Planning Commission approved all of the minutes from the July 8, 2004 meeting.
4. Neither the recordation by Ms. Brooks on July 8, 2004, nor the approval of those minutes on July 22, 2004, were sent to either the Respondent or the Petitioner.
5. The Court finds that the approval of the minutes on July 22, 2004, does not control the entry of the order of judgment as contemplated by T.C.A. §27-9-102.

In *Grigsby v. City of Plainview*, 2005 WL 1330845, No. E2004-01644-COA-R3-CV, (Tenn.Ct.App. June 6, 2005) (*no perm. app. filed*), the court discussed at length what action is required of a board in order to constitute an entry of order or judgment for the purposes of triggering the sixty-day time limitation. The court stated,

The case law beginning with the Supreme Court's decision in *Carter* certainly shows that something more than simply a vote taking place is required before a judgment or order will be considered as having been entered pursuant to Tenn.Code Ann. § 27-9-102. In *Brannon* the Board's judgment was entered when the special use permit was signed by the mayor, and in *Advanced Sales* the Board's judgment was entered when the petition was marked "Relief Denied" and signed by the Board Secretary. It is this "something more" which elevates a judgment from one which has simply been rendered, to one that also has been entered. It is this "something more" which is the "enduring evidence of the judicial act of rendition of judgment" *Carter*, 377 S.W.2d at 916.

...

In the present case, all we [are] able to glean from the sparse record is that the Board voted to revoke Evans' beer permit on February 20, 2003. While this certainly would qualify as the "rendition" of the Board's judgment, it falls short of qualifying as the "entry" of that judgment. The record contains no proof establishing whether anything

else happened on February 20th which would be sufficient to properly characterize the Board's judgment as having been entered on that day. There is no “something more” in addition to the vote of the Board and, therefore, no “enduring evidence” of the Board's rendition of judgment. *See Carter*, 377 S.W.2d at 916. Accordingly, we vacate the judgment of the Trial Court which held that the Board's judgment was entered on February 20, 2003, and that Plaintiffs' complaint was time barred. In so doing, we note that Plaintiffs' presence at the meeting when the Board revoked the beer permit is immaterial to whether the Board's judgment was entered for purposes of Tenn.Code Ann. § 27-9-102.

Grigsby, 2005 WL 1330845, at *6.

In this case, Appellees assert that Ms. Brooks' notes are the “something more” which elevate the Planning Commission's judgment on July 8, 2004, from one which was merely rendered to one that was also entered. However, the decision by the Tennessee Supreme Court in *Carter v. Bd. of Zoning Appeals of the City of Nashville*, 377 S.W.2d 914 (Tenn.1964), clearly establishes that “[t]he ‘entry’ of judgment is the ministerial act by which *enduring* evidence of the judicial act of rendition of judgment is afforded.” *Carter*, 377 S.W.2d at 916 (emphasis added). Ms. Brooks' notes can hardly be said to be “enduring” as they were not even present in the record. Furthermore, in *Advanced Sales, Inc. v. Wilson County*, 1999 WL 336305, No. 01-A-01-9805-CH00245, (Tenn.Ct.App. May 28, 1999) and *Brannon v. County of Shelby*, 900 S.W.2d 30 (Tenn.Ct.App.1995), the Tennessee Court of Appeals found that the existence of an authoritative signature on a paper writing, containing a recordation of the action taken was indicative of a ministerial act sufficient to trigger the sixty-day time limitation. *Advanced Sales, Inc.*, 1999 WL 336305, at *1-2; *Brannon*, 900 S.W.2d at 34. Here, the record is void of any evidence indicating a signature on Ms. Brooks' notes by any member of the Planning Commission or anyone else. The record does include, however, the official minutes from both the July 8, 2004, and the July 22, 2004, meetings.

Unlike Ms. Brooks' notes, the typed official minutes from the July 8, 2004, were signed by both the Chairman and the Secretary of the Planning Commission. The minutes also indicated the resolution number for the revision and the specific conditions of the approval. These minutes were not presented to nor approved by the Planning Commission until the July 22, 2004, meeting. The Court finds that these official typed minutes, signed by the Planning Commission Chairman, contain the “something more” which elevate the decision from a mere rendition of judgment to an entry of judgment, and create the “enduring evidence of the judicial act of rendition of judgment” contemplated in the *Carter* decision. *Carter*, 377 S.W.2d at 916.

Therefore, we reverse the order of the trial court which held that the Planning Commission's judgment was entered on July 8, 2004, and that the McMurray Drive Area Residents' Association was time barred, and remand the case to the trial court for proceedings consistent herewith. The costs of appeal are assessed against Appellees.

WILLIAM B. CAIN, JUDGE